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DEC 05 2006

In re Application of :
Suzuki et al. :
Application No.: 09/273,286 :
Filing or 371(c) Date: 03/19/1999 :
Attorney Docket Number: KO36-3629 :

OFFICE OF PETITIONS
DECISION ON
PETITION

This is a decision in response to the Renewed Petition Under 37 CFR § 1.181, filed October 20, 2006.

This Petition **granted**.

The above-identified application became abandoned for failure to timely and properly reply to the Notice of Allowance and issue Fee Due ("Notice"), mailed July 6, 1999. The Notice set a non-extendable three (3) month period for reply. No reply having been received, the application became abandoned on October 7, 1999. A Notice of Abandonment was mailed November 10, 1999.

December 8, 2005 Petition under 37 CFR 1.181

Applicant filed a petition to withdraw the holding of abandonment on December 8, 2008, wherein applicant alleged non-receipt of the Notice. In support of this assertion, Applicant filed a copy of his Master Docket Book and a copy of the front face of the application file jacket, and stated that he had received no communication from the PTO in this application other than the filing receipt.

The petition was dismissed in a Decision mailed August 16, 2006. The Decision dismissing the petition noted that neither the Notice nor the Notice of Abandonment were received by Applicant. Moreover, the filing receipt had also not been entered on the file jacket.

The present Renewed Petition

Applicant files the present renewed petition and provides that the data from the filing receipt (application serial number and filing date), is entered on the front face of the file jacket upon receipt of the Filing Receipt. Regarding the Notice of Abandonment, Applicant attests to a search of the master docket records for the period from November 10, 1999 through January 10, 2000, and that the docket records contain no indication of receipt of the Notice of Abandonment.

Applicant admits that the circumstances of not receiving two notices in the same application are unusual, neither notices were received.

Applicable Law, Rules and MPEP

The MPEP 711.03(c)A, Petition To Withdraw Holding of Abandonment Based on Failure To Receive Office Action, explains that

In *Delgar v. Schulyer*, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of the contention that the applicant's representative did not receive the original Notice of Allowance. Under the reasoning of *Delgar*, an allegation that an Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of *Delgar* is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133). To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. For example, if a three month period for reply was set in the nonreceived Office action, a copy of the docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. (Emphasis supplied).

MPEP 711.03(c)

Analysis and conclusion

Applicant has met the Delgar showing. Accordingly, the petition is granted.

Telephone inquiries concerning this matter should be directed to the undersigned at (571) 272-3232.


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Office of Petitions